1996

Ivie Electric Service v. Neil Sorenson Construction, Russell Sorensen, and Cindy Cain : Brief of Appellee

Utah Court of Appeals

Brian W. Steffensen; Attorney for Plaintiff/Apellee.
Samuel King; Attorney for defendants/ Appellants.

IN THE UTAH COURT OF APPEALS

IVIE ELECTRIC SERVICE, Plaintiff and Appellee, vs.	:	Appellate Ct. No.
NEIL SORENSEN CONSTRUCTION, RUSSELL SORENSEN, and CINDY CAIN Defendants and Appellants.	:	960568-CA

APPELLEE IVIE ELECTRIC SERVICES' BRIEF

An Appeal From Orders of the Third Circuit Court, Judge Dennis J. Fuchs and Judge Maurice Jones, Salt Lake County, Salt Lake City Division, State of Utah

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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. 78-2a-3(2)(d).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The two "issues" that defendants/appellants Neil Sorensen Construction and Russell Sorensen (the "Sorensens") identify for appeal are both based upon the same premise. That premise is that there was no legal basis for the awarding of attorney's fees, and that plaintiff/appellee's counsel's attempts to get attorney's fees constituted a fraud upon the court. However, the Sorensens ignore the fact that the issue of attorney's fees was resolved against them conclusively as a result of "deemed admitted" admissions from (a) a set of requests for admission which were not timely responded to (and which were never withdrawn or amended) and (b) a statement of undisputed facts in plaintiff/appellee's ("Ivie") motion for summary judgment which were not properly disputed by the Sorensens. The real issue is whether the trial court judges (Jones and Fuchs) properly ruled that the Sorensens' admissions required an award of attorney's fees, which will involve a review of issues of both fact and law.

The Court of Appeals should review any conclusions of law made by the trial court judges for correctness, but should accord such conclusions no deference. Smith v. Smith, 793 P. 2d 407, 409 (Utah App. 1990). Findings of fact shall not be set aside unless clearly erroneous. Utah R. Civ. P. 52(a).

DETERMINATIVE LAW

Ivie does not believe that the Sorensens' statement as to determinative law is

applicable. Rather, Ivie believes that the following statutes and/or rules of civil procedure and/or judicial administration are determinative:

Utah R. Civ. P. 36

Utah R. Civ. P. 56

Code Jud. Adm. Rule 4-501

U.C.A. 70A-2-201 et seq.

U.C.A. 58-55-16

STATEMENT OF THE CASE

The Sorensens failed to respond to a request for admissions, and were deemed to have admitted that they owed the money prayed for in Ivie's complaint, plus interest thereon at 18% plus attorney's fees. Ivie filed a motion for summary judgment based upon these admissions and also a separate verified statement of undisputed fact that the Sorensens owed the money prayed for, plus interest and attorney's fees. The Sorensens, incredibly, failed to set forth a "statement of disputed facts" in their memorandum in opposition to the motion for summary judgment, and failed to submit any affidavits refuting Ivie's statement of undisputed facts. Upon a motion for reconsideration, Judge Maurice Jones found that with these admissions (from the discovery and from the statement of undisputed facts) there were no longer any issues of fact and granted summary judgment to plaintiff Ivie.

Judge Jones signed an order granting summary judgment which included interest and attorney's fees. Thereafter, the Sorensens' counsel, Samuel King, filed motion after motion claiming that fees should not have been awarded and that Ivie's counsel, Brian Steffensen, had defrauded the Court. Ivie opposed these requests, and obtained orders from Judge Jones

and his successor, Judge Fuchs, affirming the summary judgment and finding that Ivie had acted in good faith in seeking attorney's fees. The Sorensens appeal these orders without ever having moved to withdraw or amend the admissions upon which the original judgment and subsequent orders are based. As a result of the Sorensens' incredibly abusive effort to set aside the judgment and orders herein, the principal, interest and fees which have been awarded to plaintiff Ivie has grown to in excess of $20,000.00. Judge Fuchs' last hearing and order in this case dealt specifically with the issue of whether the fees awarded herein were too high. Judge Fuchs ruled that the cause of the high fees which have accrued in this case was the Sorensens' improper and wrongful attempts to set aside the judgement and orders herein.

STATEMENT OF FACTS

Ivie's predecessor in interest, Main Street Lighting ("Main Street"), sold lighting fixtures to the Sorensens for installation into a home owned by the Cain's. Russell Sorensen also purchased lighting fixtures from Main Street. Russell Sorensen signed one of two invoices for these purchases, which invoices provided that unpaid balances would accrue interest at 18% and for the recovery of costs and attorney's fees. The fixtures were satisfactorily installed in the Cain residence. The Cains apparently paid the Sorensens for the fixtures, but the Sorensens did not pay Main Street.

Main Street closed its business. Ivie purchased Main Street's claim against the Sorensens and the Cains. Ivie demanded payment. When Ivie was not paid, Ivie contacted its attorney, Brian Steffensen, in 1990 and asked Steffensen to file a complaint against the Sorensens for the fixtures purchased from Main Street but for which payment had not been

received. Ivie told Steffensen that there were written invoices providing for interest and attorney's fees. Steffensen filed the complaint herein against the Sorensens, alleging breach of contract and that monies, plus interest and attorney's fees were owed. The Sorensens were served with the summons, complaint and a set of discovery. The first set of discovery included a request for admissions.

The Sorensens answered the complaint, but rather than respond to the discovery, the Sorensens sent Ivie a letter arguing that the matter should be dropped and that if Ivie was willing to drop the case it should let the Sorensens know within ten days. Ivie was not persuaded by the Sorensens' letter, so Ivie did not accept the offer to drop the case within the ten days. Even though Ivie had not agreed to drop the case within the said ten days, the Sorensens still did not respond to the discovery.

Several weeks later, Ivie filed a motion for summary judgment, based upon the "deemed admitted" admissions in the first set of discovery that the Sorensens owed Ivie the principal, interest and attorney's fees as alleged in the complaint, and upon a verified statement of undisputed facts that averred that the Sorensens owed Ivie the requested principal, interest and attorney's fees. The Sorensens failed to dispute Ivie's statement of undisputed facts, by affidavit or otherwise, and failed to move to withdraw or amend the "deemed admitted" admissions.

Judge Grant initially denied the motion, stating that "there appear to be issues of fact," but immediately recused himself. Judge Jones took over the case. Ivie filed a motion for reconsideration. Judge Jones heard oral argument on this motion after receiving the parties' memoranda. Judge Jones found that the Sorensens had not filed a timely response to

the request for admissions, and that the plaintiff/Ivie's statement of undisputed facts in its memorandum in support of the motion for summary judgment had not been refuted. Based upon the fact that the request for admissions and the statement of undisputed facts automatically became "deemed admitted" by operation of law, Judge Jones ruled that Ivie was entitled to summary judgment based upon said admissions.

Given these findings and ruling, Judge Jones signed a summary judgment in favor of Ivie and against the Sorensens on February 15, 1991. Thereafter, the Sorensens and their attorney, Samuel King, filed motion after motion trying to set aside this judgment. Interestingly enough, when King first objected to the summary judgment, he argued that he thought that his settlement letter tolled the time to respond to the discovery (which argument was briefed and rejected by Judge Jones). Now, King argues that he never saw the discovery and that it was somehow abusive for Ivie to serve discovery on the Sorensens at the same time that the summons and complaint were served on them. This is just one example of King's inability to accurately recall what has occurred in this case.

When Judge Fuchs agreed to review the propriety of the attorney's fees granted herein, he asked Ivie to submit a memorandum setting forth a history of the case and the Sorensens' motions to reconsider. Ivie complied by submitting a "Plaintiff's First Amended Memorandum re Prior Actions and Rulings Regarding Interest and Attorney's fees" to Judge Fuchs on or about December 18, 1995. This document plus exhibits is in explicably not present in the record which Ivie reviewed in preparing this Appellee's Brief. Ivie will either cause the clerk of the trial court to include a copy of this document in the record, or submit a copy thereof to the Court of Appeals under separate cover for its review. Since the history

of this case is extraordinarily long and complex, and this prior memorandum was specifically designed to provide a review of the factual history of this case for Judge Fuchs, Ivie refers the Court of Appeals to it and incorporates it by reference herein rather than to attempt to restate it in its entirety herein.

Very briefly, after approximately four attempts by the Sorensens to get Judge Jones to change his ruling, Judge Jones made the following minute entry on June 20, 1992:

JONES/SC COURT RULES THAT:

1 SUMMARY JUDGMENT IS PROPER, THEREFORE WILL NOT BE SET ASIDE

2 DEFT ANSWERS TO INTERROGATORIES & REQUESTS FOR ADMISSIONS WAS LATE & PLTF REFUSSAL TO ACCEPT THEM IS PROPER

3 DEFT CLAIM TO RIGHT TO TAKE DEPOSITION REGARDING PLTF ATTORNEY FEES IS ERRONEOUS. PLTF ATTORNEY TESTIMONY IS SUFFICIENT.

4 PRIOR RULINGS OF THE COURT WILL NOT BE ALTERED.

5 REQUEST BY DEFT FOR RECONSIDERATION IS INAPPROPRIATE

In response to this minute entry, Ivie prepared the following Findings and Conclusions, but due to Judge Jones' retirement, they were executed by Judge Jones' successor, Judge Fuchs, on December 16, 1992:

> Defendants' counsel having filed "Defendants' Motion for Stay of Execution, For Extension of Time in Which to File Appeal and for review of All Proceedings", and the Court having heard oral argument on the same on August 23, 1991, and again on September 27, 1991, plaintiff being represented by Brian W. Steffensen and defendants by Samuel King, and the Court having considered Mr. King's request for findings as to its prior orders and its order in response to Mr. King's latest Motion, the Court determines that it would be helpful to all concerned if it set forth its findings in this matter and then its final ruling based thereon;

Consequently, the Court finds and concludes as follows from the pleadings and admissions on file herein:

1. Plaintiff filed this action in the late spring of 1990, and caused a summons, complaint and discovery (which discovery included requests for admission) to be served upon defendant Cindy Cain ("Cain") and the other "Sorensen Defendants" herein.

2. The Sorensen Defendants answered plaintiff's complaint without making a motion for more definite statement or to quash because an exhibit thereto was not attached.

3. The plaintiff filed a Motion for Summary Judgment on two independent factual grounds: (i) the requests for admissions served on the defendants which had not been responded to, and (ii) a statement of undisputed facts verified under penalty of perjury by Brent Ivie.

4. The Sorensen Defendants filed a "Defenses to Motion for Summary Judgment" which did not constitute a motion to withdraw or amend the admissions and which did not refute the statement of undisputed facts as required in the Rules of Judicial Administration. Consequently the plaintiff's factual assertions in the requests for admission and in the unrefuted statement of undisputed facts that:

(a) there were valid and enforceable agreements between plaintiff and the Sorenson Defendants which require the Sorenson Defendants to pay plaintiff the principal balance due, plus interest thereon at 18% per annum and plaintiff's attorney's fees;

(b) the defendants have no valid defenses, counterclaims or set-offs against plaintiff's claims; and

(c) defendant Cain is liable to plaintiff for these same amounts (principal, interest and attorney's fees) under the bond statute and the theory of quantum meruit; were all deemed admitted and conclusively established for all-purposes in this litigation.

5. After hearing oral argument on these motions on January 24, 1991, the Court granted plaintiff's motion for summary judgment in accordance with the foregoing admitted and conclusively established facts.

6. On or about February 13, 1991, plaintiff caused copies of the proposed orders re the motions and granting summary judgment to be mailed to the

Sorensen Defendants' counsel, Mr. King. Mr. King did not object to the language of those orders or the Affidavit of Counsel re Costs and Fees accompanying them, and the Court subsequently executed them.

7. On March 19, 1991, Mr. King obtained an Order Staying Execution supported solely by Mr. King's personal promise to promptly pay any judgment obtained against defendants when due.

8. Thereafter, Mr. King filed two motions to set aside the Court's granting of summary judgment, which were denied by the Court.

9. Mr. King now seeks, for apparently the third time, to have the Court set aside its prior granting of summary judgment in favor of plaintiff and against the Sorenson Defendants. However, the admissions upon which the Court previously based its ruling granting this summary judgment remain unwithdrawn and unamended such that they continue to be of full force and effect and binding upon the Court herein.

10. Based upon these admissions, the Court still finds that:

(a) the Sorenson Defendants owe plaintiff the principal amounts plus interest alleged in the complaint and set forth in the admissions;

(b) the agreements between the plaintiff and the Sorenson Defendants provided for attorney's fees to plaintiff;

(c) the Sorenson defendants have no defenses, counterclaims or setoffs against plaintiff's claims against them herein.

11. Mr. King disputes plaintiff's counsel's affidavits of attorney's fees and seeks to take the deposition of counsel on the issue of fees. The Court finds plaintiff's counsel's affidavits, taken as a whole, to provide all of the detail necessary for the Court to determine the reasonableness of said fees and to form a basis for the Court's awards herein such that there is no need to seek additional information and/or clarification from counsel by way of deposition.

Consequently, ITS IS HEREBY ORDERED, ADJUDGED AND DECREED that all orders of this Court entered prior hereto granting plaintiff judgment against the Sorenson Defendants and their surety, Mr. King, for principal, interest and attorney's fees are hereby reaffirmed; defendants' motions to set aside or modify the same are all denied; defendants' motion for leave to depose plaintiff's counsel is denied; plaintiff is granted an additional award against the Sorenson Defendants and their surety Samuel King of attorney's fees

incurred in this action in defending against the defendants' unsuccessful motions which have not been previously awarded herein from June 17, 1991 through the present in the amount of $3,412.50 through the date hereof, less those attorney's fees previously awarded to plaintiff which plaintiff has admitted were related to defending against defendant Cain's motion to set aside default judgment in the amount of $1,811.00, as supported by plaintiff's counsel's Revised Affidavit submitted herewith, for a total additional award of $1,601.50.
(Record pp. 546-551)

After approximately four more attempts to get the judgment herein set aside, three (3) before Judges Fuchs and one before Judge Young (of the Third District Court on a Writ of Mandamus), on April 15, 1996 Judge Fuchs entered the following order after oral argument and full briefing:

Defendants' motion to reconsider prior orders and plaintiff's entitlement to attorney's fees, and Plaintiff's motion for an additional award of attorney's fees, having come on for hearing before the Honorable Dennis Fuchs on February 1, 1996, the plaintiff represented by Brian W. Steffensen, and the defendants by Samuel King, and the Court having reviewed the written materials prepared by the parties, and heard oral arguments,

The Court Makes The Following Findings and Rulings:

1. Despite the Court's order and admonition that it would not reconsider prior rulings of this Court, defendants submitted written materials and oral argument urging the Court to find that plaintiff and its counsel committed wrongful acts and/or that plaintiff was otherwise not entitled to an award of attorney's fees.

2. The Court does not believe that the defendants' motions are procedurally proper, but given the nature of its findings as set forth hereafter, will rule on them any way.

3. This Court reviewed the record, memoranda and arguments in this matter, and finds that:

a. The defendants did not respond to plaintiff's requests for admission within thirty (30) days as required by the rules, such that said admissions became deemed admitted;

b. The defendants did not properly dispute the plaintiff's statement of undisputed facts in connection with plaintiff's motion for summary judgment, such that said statement of undisputed facts became deemed admitted for the purposes of said motion;

c. Judge Maurice Jones, having also found the same facts to be true, properly granted plaintiff's motion for summary judgment, including the awarding of attorney's fees;

d. The defendants almost immediately made motions to set aside this ruling, and charged that plaintiff was not entitled to attorney's fees;

e. The plaintiff filed opposing memoranda demonstrating that there were not only deemed admitted admissions requiring the awarding of attorney's fees, but that there were signed invoices and statutory grounds upon which attorney's fees were properly awarded;

f. Judge Maurice Jones, therefore, properly denied all of defendants' motions attacking plaintiff's judgment, and properly awarded additional attorney's fees to plaintiff;

g. Neither Plaintiff nor its counsel has committed any fraud upon this Court, nor otherwise improperly acted in this action;

h. The amount of attorney's fees and costs incurred by the parties in this case far exceeds the principal amounts in dispute, but that is the direct result of the defendants' incessant and groundless motions to set aside this Court's rulings and orders;

i. The amount of attorney's fees previously awarded by this Court to plaintiff was properly incurred by plaintiff and properly awarded by the Court;

j. The prior judgments of this Court require the awarding of additional attorney's fees and costs incurred by plaintiff since the last fees and costs were awarded;

k. The amount of costs and fees sought by plaintiff as set forth in plaintiff's memorandum dated December 18, 1995 on page 13 is appropriate;

l. The methodology employed by plaintiff in calculating the amount currently due under this Court's orders as set forth in plaintiff's memorandum dated December 18, 1995 on page 13 is also appropriate;

m. The judgments of this Court are against not only the named defendants herein, but also against their counsel, Samuel King, pursuant to his surety given to Judge Gowans in connection with the motion to stay execution filed by Mr. King and Order Staying Execution of Judgment as to Defendants Neil Sorensen Construction and Russell Sorensen dated March 19, 1991;

n. The defendants were given opportunities previously to file any desired appeals, but elected not to do so.

4. Based upon the foregoing findings, the Court denies defendants' motions and grants plaintiff's request for additional attorney's fees.

5. The plaintiff is awarded an additional $7,125.00 in attorney's fees against defendants Neil Sorensen Construction, Russell Sorensen and Samuel King.

6. The defendants and their counsel are admonished not to file any further motions in this matter, or be subject to sanctions.

(Record pp. 1159-1162)

The Sorensens filed the instant appeal claiming that Judges Jones and Fuchs erred in granting Ivie attorney's fees and claiming that Ivie and its counsel, Steffensen, defrauded the Court.

SUMMARY OF APPELLEE'S ARGUMENT

Utah R. Civ. P. 36 provides that when a request for admission is not admitted or denied within the time period required, that requested admission becomes "deemed admitted" for all purposes in the case thereafter. Utah R. Civ. P. 56, coupled with Code of Judicial Administration R. 4-501, provide that if a movant sets forth a verified statement of undisputed facts, and those facts are not specifically disputed by citation to the record or to an affidavit, then the facts set forth in the statement of undisputed facts become "deemed admitted" for the purposes of the motion. Judge Jones found that the Sorensens had not responded to the admissions in time, and had not disputed Ivie's statement of undisputed facts in the motion for

summary judgment. Based upon those findings of fact, Judge Jones had no choice under the law but to grant Ivie's motion for summary judgment. The summary judgment included interest at 18% per annum and attorney's fees because the Sorensens were deemed to have admitted that their agreement with Main Street specifically included interest at 18% and for the recovery of attorney's fees.

The Sorensens never moved to withdraw or amend the deemed admitted admissions. Rather, they began to accuse Ivie's counsel Steffensen of fraud. The parties briefed the Sorensens' claims that Ivie was not entitled to fees, and that Steffensen committed fraud, at least eight (8) separate times. Although the issue had been conclusively and irrevocably resolved due to the admissions, Ivie pointed out in its papers filed with the Court that there were signed invoices that provided for interest and attorney's fees; that under the UCC, even unsigned invoices between "merchants" become the written agreement between the parties; and that the contractors' statute required the Sorensens to pay the money owed to Main Street/Ivie within a certain time period, or the Sorensens would be required to pay interest and attorney's fees. The trial judges found that Ivie and Steffensen had acted in good faith and reaffirmed that due to the still "deemed admitted" admissions, Ivie was conclusively entitled to its judgment.

The trial judges' findings of fact as to the Sorensens' failure to respond to the discovery and failure to refute Ivie's statement of undisputed facts, and as to the good faith of Ivie and its counsel Steffensen, were correct -- and certainly not "clearly erroneous."

The trial judges' conclusions of law based upon these findings of fact were correct -- with admissions "deemed admitted," the trial judges were required by law to grant judgment to Ivie.

The Sorensens' appeal merely rehashes the same old arguments which they first made in 1991, and which were presented and rejected by the trial court judges on at least eight different occasions. The Appeals Court should similarly reject them. Both trial court judges ultimately lost patience with the Sorensens' incessant and frivolous cries of foul -- and awarded Ivie its fees in having to defend against the same. Due to the equally frivolous nature of this appeal, Ivie requests an award of fees incurred on appeal, to be assessed against the Sorensens and their counsel/surety, Mr. King.

ARGUMENT

A. Rule 36 Requires Timely Response or Admissions are "Deemed Admitted."

Utah R. Civ. P., Rule 36 is absolutely clear:

> "(a) ... Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter .... (b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

There is no dispute over the fact that the Sorensens did not answer Ivie's request for admissions within the time period required. Given this FACT, by operation of the foregoing rule Ivie's requested admissions became "deemed admitted." Judge Jones so ruled -- and he was absolutely correct. The Sorensens never moved to withdraw or amend said admissions. So, the trial judges never had any choice but to consider the admissions to be "admitted" at all relevant points in time.

B. Rule 56 and Rule 4-501 Require the Opponent of a Motion for Summary Judgment to Dispute the Movant's "Statement of Undisputed Facts" or the Same Shall Be "Deemed Admitted." Utah R. Civ. P., Rule 56 also clearly states:

(c) ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Code of Judicial Administration, Rule 4-501(2)(b) states that:

(b) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Ivie's motion for summary judgment included in its Statement of Undisputed Facts a statement that the Sorensens owed the principal balance claimed due, plus interest thereon at 18% and costs and attorney's fees. The statement of undisputed facts was verified under oath by Brent Ivie, president of Ivie, and formerly president of Main Street. (Record pp. 18-26). The Sorensens filed a "Defendants' Defenses to Plaintiff's Motion for Summary Judgment" (Record pp. 32-44) which failed entirely to comply with Rule 4-501(2)(b). It contained no statement of disputed facts. It was not accompanied by any affidavit setting forth opposing facts. Simply stated, it failed to dispute plaintiff's statement of disputed facts. Judge Jones so found, and based upon this finding, he ruled that Ivie's statement of undisputed facts became admitted for purposes of the motion for summary judgment. These findings and ruling were entirely correct.

C. **Trial Judges Are Not Allowed to Ignore Admissions -- Judges Jones and Fuchs Were Simply Following Utah Supreme Court Law**. The Utah Supreme Court has ruled on numerous occasions that when admissions are "deemed admitted," and when a movant's statement of undisputed fact becomes "admitted," the trial courts may not ignore said admissions.

In W.W. & W.B. Gardner, Inc. v. Park West Village Inc., 568 P. 2d 734 (Utah 1977), the Utah Supreme Court upheld a motion for summary judgment which was granted against the defendant, Park West Village, Inc., based in part upon said defendant's failure to respond to plaintiff's request for admission under Rule 36(a) of the Utah Rules of Civil Procedure. In so ruling, the court stated that:

> "However, through a series of requests for admission, plaintiff established the requisite facts concerning the agency relationship and defendants' responsibility for the work. Defendant belatedly responded to the admission, but under Rule 36(a), U.R.C.P., these matters were deemed admitted when defendant failed to answer or object with thirty (30) days after service."

The Court went on to state that the defendant could not "ignore with impunity the necessity to respond within thirty (30) days or request additional time or seek a protective order under Rule 26(3)". Finally, the Court stated that "the rules were designed to secure the just, speedy and inexpensive determination of every action." The defendant, by failing to respond to the requests for admission in the time set forth in the Rules, had frustrated the purpose of the Utah Rules of Civil Procedure.

In Schmitt v. Billings, 600 P. 2d 516 (Utah 1979), when an inmate in the Utah State Prison brought an action against the Division of Corrections and certain individual defendants to recover the value of his personal property, allegedly taken into custody by prison personnel and

never returned to the inmate, then inmate filed with his complaint a request for admission. When the defendants failed to respond to the requests for admission, the plaintiff inmate filed a motion for summary judgment. The Utah Supreme Court overturned the trial court's refusal to grant summary judgment because the defendants had failed to answer the request for admissions within forty-five (45) days after they were served upon them and the plaintiff therein was therefore entitled to summary judgment as a matter of law.

In Whitiker v. Nikols, 699 P. 2d 685 (Utah 1985), a waitress brought suit claiming that she had been injured by a restaurant manager when the manager took her arm and gave it a violent pull and twist. The trial court found no cause of action and dismissed the complaint against the manager. The Utah Supreme Court, however, reversed the trial court and required a judgment to be entered in favor of the plaintiff and against the defendant because the defendant had failed to respond to requests for admission in a timely fashion and the plaintiff therefore was entitled to summary judgment. In so ruling, the Court emphasized that "this court has consistently held that matter contained in a plaintiff's requests for admission are deemed admitted when a defendant fails to answer or object within thirty (30) days of the date of service."

Finally, in the case of Jensen v. Pioneer Dodge Center, Inc., 702 P. 2d 98 (Utah 1985), the plaintiff filed a complaint against the defendant on May 15, 1980 and then, on August 18, 1980, plaintiff served a request for admissions, a request for production of documents, and interrogatories on defendant. On November 3, 1980, plaintiff moved for summary judgment claiming that no genuine issue of fact existed since pursuant to the Utah Rules of Civil Procedure, the defendant's failure to respond to the matters contained in plaintiff's request for admissions were deemed admitted when not answered within thirty (30) days. At the hearing on

plaintiff's motions on November 10, 1980, defendant filed answers to the request for admissions and responses to the request for production of documents and interrogatories. The trial court subsequently denied plaintiff's motion for summary judgment. At the trial, the court found for the defendant. Upon appeal, however, the Utah Supreme Court again reversed the trial court and ruled that the trial court should have granted plaintiff's motion for summary judgment. The Utah Supreme Court in so holding again emphasized:

> "Plaintiff appeals contending among other things that under Rule 36(a), the matter contained in his request for admissions should have been deemed admitted and his motion for summary judgment granted. ...
>
> This Court has consistently held under Rule 36(a) that matters contained in plaintiff's request for admissions are deemed admitted when a defendant fails to object or answer within thirty (30) days after the date of service of the request."

In the Jensen v. Pioneer Dodge Center case, the Utah Supreme Court simply refused to accept defendant's belated attempt to answer the request for admissions and held strictly that requests for admission not answered in the required time period are deemed admitted.

Judges Jones and Fuchs simply followed the law set down by the Supreme Court of the State of Utah. Once the admissions were established, Ivie was and still is entitled to summary judgment as a matter of law.

D. Ivie Had a Good Faith Belief That It Was Entitled to Attorney's Fees, So There Was No Reason to Relieve the Sorensens From the Consequences of Their Admissions. The Supreme Court rulings set forth above make it clear that once admissions are obtained, the parties and the court are bound by them. This means that the Sorensens' almost innumerable attempts to set aside the judgment herein were legally and procedurally improper. But, Ivie nevertheless sought to show through its memoranda and affidavits that it had acted in

good faith when it claimed that the Sorensens were required to pay its attorney's fees, and that Ivie had in no way committed any fraud upon the Court. (See, for example, Ivie's memoranda at Record, pp. 187-212)

Ivie was able to demonstrate to Judges Jones and Fuchs that Main Street supplied fixtures which were satisfactorily installed at the Cain residence, that the Sorensens were paid by the Cains but did not pay Main Street or Ivie, and that Russell Sorensen signed at least one of the invoices (which provided for interest and attorney's fees). Ivie also presented numerous theories upon which, given these facts, Ivie was legally entitled to recover its fees and costs from the Sorensens (that there were signed agreements, that under the UCC even if the invoices had not been signed that they constituted the written agreement between the parties, and that the contractors statute provides for attorney's fees if a contractor is paid but does not pay his suppliers). Judges Jones and Fuchs found that based upon these facts, and the legal arguments in the memoranda cited above, Ivie and its counsel Steffensen had not perpetrated any fraud upon the court and had a good faith belief that Ivie's claim for attorney's fees was proper.

Once Judges Jones and Fuchs became convinced that Ivie and Steffensen had a good faith belief that Ivie was entitled to ask for attorney's fees, there simply was no basis upon which they should relieve the Sorensens from the consequences of their admissions. If the Sorensens have any legitimate complaint in this litigation, it is probably against their own counsel for having allowed the admissions to become deemed admitted in the first place, and then for having run up the fees in this matter by filing motion after frivolous motion.

E. **Although Not On Point, Sorensens' Arguments Are Without Merit**. The foregoing analysis is dispositive of this appeal. But, the Sorensens' brief makes numerous

scandalous claims against Ivie and Steffensen and is full of misstatements of fact. Out of an abundance of caution, Ivie will address some of the more outrageous claims and egregious misstatements of fact made by the Sorensens in their brief.

1. **The Sorensens' Claims to a Set off On the Stavros Project Are Groundless and Disputed.** The Sorensens claim that the reason that they did not pay the monies owed to Main Street/Ivie on the Cain residence was that they claimed a set off for allegedly faulty electrical fixtures sold to the Sorensens by Main Street and installed in the Stavros residence. Although this matter was rendered moot by the Sorensens' admissions, Ivie stated in verified papers filed with Judge Jones that Main Street had the manufacturers' representative visit the Stavros residence to inspect the fixtures, and that it was discovered that the Sorensens' electrician had installed a critical portion of the fixtures upside down. As a result of this faulty installation by the Sorensens, the fixture was damaged when power was turned on. Main Street therefore refused the Sorensens' demand for set off in this regard. (See Ivie's argument on this issue at Record, pp. 193-194)

2. **The Sorensens' assertion that there is no invoice that provides for interest and attorney's fees is outrageously false.** Throughout this case, the Sorensens and King have claimed in their many motions that there are no invoices, signed or otherwise, which provide for interest and attorney's fees. This is simply untrue. At the Record, pp. 196-197, two of the invoices are attached to a memorandum filed by Ivie on or about April 11, 1991, one of which is clearly signed by Russell Sorensen. They both provide at the bottom for interest and attorney's fees . Despite the fact that these documents were filed by Ivie with the trial court and served upon the Sorensens and King clear back in 1991, Sorensens against falsely claim that no such

documents exist in paragraphs 4 and 23A of their brief. This is typical of the false statements that the Sorensens and King have made in their papers in this matter.

3. **The Sorensens' Claim That King Did Not See The Discovery When It Was Originally Served Is Untrue.** At paragraph 13 of the factual statement in the Sorensens' brief, King states that he did not see the requests for admission or he would have responded to them. King goes on to claim that Ivie did something wrong by serving the discovery at the same time that it served the summons and complaint. This is interesting because in the "Defendants' Defenses to Plaintiff's Summary Judgment" filed on or about October 10, 1990, King argued that he had sent a offer of settlement and thought that this offer had tolled the time for discovery. At Record, p. 37, King stated:

> If plaintiff didn't agree with defendant's settlement proposal, it had only to call defendant's counsel, and a response would have been made to the discovery. Admittedly, there was no written stipulation for extension of time. Those too cost both sides fees. Under common practice, for a case like this, defendant's counsel acted reasonably in waiting for a response before going further. In his letter, he had asked for a response in 10 days, but again these cases are not at the top of an attorney's agenda, and responses are often late.

From this language written at the time that the actual events occurred, it is clear that King had seen the discovery and the admissions, but had simply failed to respond to them. The truth is, as King himself wrote, "... these cases are not at the top of an attorney's agenda, and responses are often late." King forgot to respond to the discovery in a timely fashion -- but now falsely states otherwise to this Court in a desperate attempt to foist blame for his inaction and dereliction upon Ivie and Steffensen.

4. The Sorensens Falsely State That King Did Not See That Judge Jones' Order Denying a Motion to Set Aside the Judgment Included an Award of Additional Attorney's fees to Ivie. Another of the blatant falsehoods contained in the Sorensens' brief (and throughout Sorensens' various motions to the trial judges) is the claim that Ivie prepared a proposed order for Judge Jones' signature in which the Sorensens' motion to set aside the judgment was denied, which had "buried" in it an award of attorney's fees, and that Ivie did not submit this order to the Sorensens or King for review (See Sorensens' Brief, par. 25 at p. 11).

The Sorensens and King filed objections to this proposed order, and specifically objected to the award of additional attorney's fees contained therein. See Record, pp. 323-329, and specifically p. 326. It is incredible, therefore, that the Sorensens and King have claimed continuously thereafter at the trial court level, and again now before this Court of Appeals, that they were not aware that Ivie was seeking an award of additional attorney's fees in said proposed order.

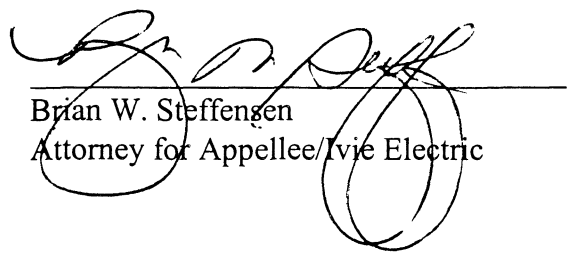
The sad truth is that an attorney has attempted to mislead the trial court, and now this Court. But that attorney is not Steffensen -- it is Samuel King. The foregoing examples of King's misstatements of fact and abusive positions should be sufficient to convince this Court, as the trial judges became convinced, that there simply is no truth or merit to the claims made by King on behalf of the Sorensens.

CONCLUSION

The facts relating to the Sorensens' failure to respond to discovery and failure to dispute Ivie's statement of undisputed facts in its Motion for Summary Judgment are not in dispute. The law requires those admissions to be "deemed admitted." The trial judges were not

persuaded by any of the Sorensens' arguments to set aside those admissions and the judgment granted pursuant thereto. It is compelling that both trial judges independently reviewed the same facts and law and reached the same conclusions. The discretion exercised by them was proper. Like them, this Court should also conclude that the Sorensens' claims are merit less and should be denied. Ivie respectfully requests that this appeal be denied and that Ivie be awarded its costs and fees in defending against the same.

DATED the 23rd day of December, 1996.

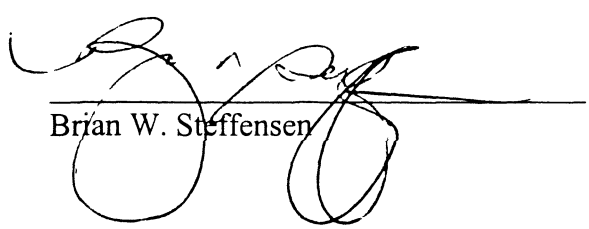


Brian W. Steffensen
Attorney for Appellee/Ivie Electric

CERTIFICATE OF SERVICE

I, Brian W. Steffensen, hereby certify that on the 23rd day of December, 1996, I caused four copies of the foregoing APPELLEE IVIE ELECTRIC SERVICE'S BRIEF to be served on the Appellants' counsel by mailing the same postage prepaid to the following address:

Samuel King
989 East 900 South, #A-1
Salt Lake City, Utah 84105



Brian W. Steffensen

ADDENDA

A. Utah R. Civ. P. 36

B. Utah R. Civ. P. 56

C. Utah Code of Jud. Adm., R. 4-501(2)(b)

D. Plaintiff's First Amended Memorandum re Prior Actions and Rulings Regarding Interest and Attorney's Fees (Without Exhibits)

Note -- Addendum D does not contain the approximately one and one/half inches of exhibits. It the original is not made a part of the record by the trial court, Ivie will submit a full copy of Addendum D to the Court for its review under separate cover.

(c) **Right of party examined to other medical reports.** At the time of making an order to submit to an examination under Subdivision (a) of this rule, the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted. If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if an examiner fails or refuses to make such a report the court may exclude the examiner's testimony if offered at the trial, or may make such other order as is authorized under Rule 37.
(Amended effective May 1, 1993.)

Rule 36. Request for admission.

(a) **Request for admission.** A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.
(Amended effective Jan. 1, 1987.)

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

(Amended effective January 1, 1985)

Rule 55. Default.

(a) **Default.**

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party

(b) **Judgment.** Judgment by default may be entered as follows

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim In all cases a judgment by default is subject to the limitations of Rule 54(c)

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court

(Amended effective Sept 4, 1985)

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing The adverse party prior to the day of hearing may serve opposing affidavits The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) **Motions for summary judgment.**

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) **Hearings.**

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) **Expedited dispositions.** Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) **Telephone conference.** The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991.)

Rule 4-502. Discovery procedures in civil cases.

Intent:

To establish a procedure for the filing of discovery documents.

To establish a limitation on discovery procedures within 30 days of trial.

Applicability:

This rule shall apply to the District, Juvenile and Circuit Courts.

Statement of the Rule:

(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only the original certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with a copy of the proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with a copy of the proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery request or response which is at issue in the motion.

(4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court except as provided in this Code or upon order of the court for good cause shown.

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto, and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty

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Attorney for Plaintiff

IN THE THIRD CIRCUIT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

Ivie Electric Service, Plaintiff,	Plaintiff's First Amended Memorandum re Prior Actions and Rulings Regarding Interest and Attorney's Fees
vs.	
Neil Sorensen Construction, Russell Sorensen, and Cindy Cain, Defendants.	Civil No. 903008156 Judge Dennis Fuchs

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Pursuant to the Court's "Order Re Judge Young's Ruling Denying Writ of Mandamus," plaintiff hereby provides the Court with a chronology of events relating to the awarding of interest and attorney's fees in this action. Accompanying this Memorandum is a set of the exhibits referred to herein. Plaintiff is entitled to an order affirming prior awards, and to an award of additional fees incurred after July 20, 1992 through the present as set forth on page 13 hereafter .

Plaintiff Moved the Court for Summary Judgment On Two Grounds (a) the Deemed Admitted Admissions and (b) a Sworn Statement of Undisputed Facts. Exhibit A-1 contains a copy of plaintiff's Reply memorandum in connection with the original motion for summary judgment, which clearly sets forth the two bases upon which plaintiff claimed that summary judgment should

be granted. Initially Judge Grant denied the motion "because there appear to be issues of fact." But, upon a motion for reconsideration, Judge Jones granted plaintiff's motion for summary judgment (Exhibit A-2). Plaintiff mailed an affidavit of costs and fees (Exhibit A-3) together with a proposed "Summary Judgment" to defendants' counsel and the Court on February 13, 1991. Judge Jones signed the Summary Judgment (Exhibit A-4) on February 15, 1991.

The Initial Order Granting Summary Judgment Provided For Interest and Attorney's Fees.

Interest and attorney's fees were awarded in the Summary Judgment signed by Judge Jones on February 15, 1991. Paragraphs 2 and 4 thereof provided that interest would accrue on the amounts awarded in the judgment (18% on the principal portion of the judgment, and 12% on the costs and attorney's fees until paid in full). Paragraph 3 thereof provided that the Summary Judgment included "... attorney's fees of $2783.15; plus any additional attorney's fees incurred in collecting this judgment upon motion supported by counsel's affidavit." (Exhibit A-4)

Defendants' First Motion to Set Aside Claimed Fraud On the Part of Plaintiff's Attorney and that Attorney's Fees Are Not Justified.

On February 21, 1991, defendants' counsel, Samuel King, filed his first motion to set aside the judgment (Exhibit B-1). In paragraph 7 of defendants' motion, Mr. King alleged that

> "... defendants' counsel has just received a proposed judgment from plaintiff's counsel. This judgment allows $2,700 to plaintiff for attorney fees. It is not just that these are patently excessive on a $1,000 claim that didn't go to trial. Worse, there is no basis in plaintiff's pleadings, nor its alleged contract, which allows plaintiff any right to any attorney fees at all."

Paragraph 12 of defendants' motion stated the following:

> "It is at this point that the case becomes somewhat weird, for lack of a better word. However, it also becomes important far beyond the dollars involved. That is because it

appears that the court has been intentionally misled by plaintiff. The matter has to be analyzed."

The defendants went on to demand costs and attorney's fees, and that plaintiff's judgment be set aside and its complaint dismissed, as sanctions.

Plaintiff filed its opposition to this first motion to set aside on March 6, 1991 (Exhibit B-2). In this opposition, plaintiff summarized its opposition as follows:

> It is clear from the defendants' latest "Motion for Relief" that defendants' counsel doesn't understand the Rules of Civil Procedure, the Rules of Judicial Administration or how to read a calendar. Furthermore, the assertions in defendants' "Motion for Relief" to the effect that plaintiff and/or its counsel intentionally committed a fraud on the Court are outrageous and unconscionable. Not only should this Court summarily deny defendants' "Motion for Relief", but should impose sanctions upon defendants and their counsel for filing such a ridiculously unmeritorious motion. Plaintiff **respectfully requests that the judgment that plaintiff has heretofore obtained in this matter be amended to include the additional fees and costs it has expended in responding to defendants' frivolous "Motion for Relief**."

Mr. King filed defendants' reply memorandum on March 14, 1991 (Exhibit B-3), withdrawing some of his claims of wrongdoing against plaintiff and offering to pay costs and fees. Mr. King further asserted the following with respect to interest and attorney's fees:

"c. The Complaint asks for attorney fees and high interest.

d. There was nothing in the Complaint to justify that relief.

e. The Complaint stated (paragraph 21) that invoices were annexed. These presumably contained the language allowing interest and attorney fees."

Judge Jones rejected Mr. King's arguments and denied this first motion to set aside on May 6, 1991 without oral argument (See docket entry).

Prior to Judge Jones' Ruling on the First Motion to Set Aside, Mr. King Filed a Motion to Stay Execution and Personally Pledged to Pay Any Judgment Granted Herein.

On March 19, 1991, Mr. King filed his first motion to stay execution (Exhibit C-1). Therein, Mr. King agreed to personally pay any judgment granted to plaintiff herein and sustained by the Court. Mr. King further claimed that he had not been aware that Judge Jones had executed the Summary Judgment, and charged plaintiff with wrongful conduct for the handling of said Summary Judgment. Mr. King also argued that attorney's fees and interest should not be awarded.

Plaintiff filed its objection thereto on April 11, 1991 (Exhibit C-2). In this pleading, plaintiff set forth in detail: (1) **two statutory bases for attorney's fees** ((a) the UCC relating to transactions between merchants, and (b) UCA 58-55-16 which provides that general contractors who do not pay subcontractors after receiving funds from the owner must pay costs and attorney's fees), and (2) **that two invoices (attached as exhibits thereto) provided for interest and attorney's fees**.

Judge Gowans entered an ex parte Order Staying Execution of Judgment (Exhibit C-3), stating: "As security, the court accepts defendants' counsel Samuel King's personal guarantee of prompt payment of any judgment should such be affirmed."

Mr. King Filed His Second Motion to Set Aside the Judgment Against the Sorensen Defendants.

On April 15, 1991, Mr. King filed his second motion to set aside the summary judgment, with related motions for sanctions and for summary judgment (Exhibit D-1). Mr. King challenged plaintiff's attorney's fee affidavit, alleging that none of the grounds therein have any basis and charging plaintiff's counsel with fraud.

Plaintiff filed its memorandum in opposition to this second set of motions on April 29, 1991

(Exhibit D-2). In this opposition, plaintiff refuted Mr. King's assertions by restating the points made in plaintiff's opposition to the motion to stay execution (i.e., that there are two statutory bases for interest and fees, and that there are signed invoices -- with copies attached -- supporting the interest rate and attorney's fees). Plaintiff also asked the Court to grant plaintiff an award of additional costs and fees associated with having to defend against defendants' meritless motions to set aside. **(Plaintiff directs the Court's attention to this memorandum -- Exhibit D-2 -- as a very good analysis of plaintiff's right to judgment and refutation of defendants' meritless arguments)**.

Mr. King filed a reply memorandum on May 2, 1991 (Exhibit D-3) generally excoriating plaintiff's counsel.

(Note - the first Motion to Set Aside was denied without oral argument on May 6, 1991)

Judge Jones Heard Oral Argument on the Second Motion to Set Aside Judgment on May 13, 1991, and Denied That Motion on May 29, 1991.

On May 13, 1991, counsel argued the motion to set aside default judgment against Cindy Cain (and related motions of defendant Cain), the second motion to set aside summary judgment against the Sorensen Defendants (and related motions), and plaintiff's request for additional attorney's fees. The Court took the matter under advisement.

On May 29, 1991, the Court entered a minute entry on the docket indicating that: "Deft Motion to set aside default judgment as to Cindy Cain Granted. Deft Motion to set aside summary judgment against Sorensen Construction Denied." Copies of the docket sheet were mailed to counsel shortly thereafter.

The Parties Submitted Alternative Orders Relating to the Denial of the Second Motion to Set Aside Judgment -- With Plaintiff's Order Providing for Additional Attorney's Fees and a Judgment Against Sam King, Personally

On June 5, 1991, Mr. King mailed to plaintiff a copy of proposed Findings of Fact and Conclusions of Law prepared by Mr. King's office.

On June 18, 1991, plaintiff mailed the Court and opposing counsel a cover letter and (1) its "Objection to Proposed Order Prepared by Defendants on Cindy Cain's Motion to Set Aside Default", (2) plaintiff's proposed alternative "Order Setting Aside Default Against Cain, Denying Motion to Set Aside Summary Judgment, and Denying Defendants' Other Motions", (3) plaintiff's counsel's affidavit re additional attorney's fees incurred after the granting of the Summary Judgment, (4) a copy of the Order Staying Execution (with Sam King's personal guarantee of the judgment), and (5) a copy of the Summary Judgment (collectively E-1).

The text of the cover letter emphasized that the plaintiff felt that Mr. King should be ordered to personally pay the judgment affirmed by the Court herein (see item #4 in the letter), and that the Summary Judgment provided for the awarding of additional attorney's fees (see item #5 of the letter).

On June 24, 1991, Mr. King filed an objection to plaintiff's alternative proposed order (Exhibit E-2), an objection to plaintiff's affidavit of attorney's fees (Exhibit E-3), and another set of proposed findings of fact and conclusions of law. The caption of one of these pleadings was: "**Defendants Sorensen's Objection to Plaintiff's Attorney Fee Request and Affidavit and Proposed Judgment**." (Exhibit E-3) It is obvious from this pleading that Mr. King not only read plaintiff's proposed order, but understood that it sought to have additional fees awarded and would, if signed by the Court, be an additional judgment against the Sorensen Defendants herein.

In connection with Mr. King's objection to plaintiff's request for fees made in plaintiff's proposed alternative order, Mr. King also filed a notice of taking of plaintiff's attorney's deposition.

On July 9, 1991, plaintiff filed its "Reply to 'Defendants Sorensen's Objection to Plaintiff's Attorney Fee Request and Affidavit and Proposed Judgment" (Exhibit E-4) and its Motion for Protective Order (Exhibit E-5). Attached to the Motion for Protective Order was an affidavit of counsel containing detailed time records supporting all attorney's fees awarded and/or sought in the new proposed Order. The Reply memorandum addressed specifically the issue of the new award of attorney's fees that plaintiff was seeking in its proposed order. The Reply memorandum also argued that Mr. King, as the surety in connection with the Order to Stay Execution, should be ordered to pay the judgment herein.

On July 26, 1991, plaintiff's counsel received a telephone call from Judge Jones' clerk, Sally, in which she indicated that Judge Jones had signed plaintiff's proposed alternative order on June 21, 1991 (Exhibit E-6) and would not sign any further orders in this case.

Plaintiff Sent Out a Notice of Judgment, Defendant Filed Another Motion to Stay Execution (Essentially a Third Motion to Set Aside Judgment).

On or about August 7, 1991, Plaintiff filed a Notice of Judgment and mailed the same to Mr. King (Exhibit F-1).

On August 13, 1991, defendants filed "Defendants' Motion for Stay of Execution, For Extension of Time in Which to File Appeal, and for Review of All Proceedings." (Exhibit F-2) This pleading alleged, among other things, (1) that plaintiff hid from the Court and Mr. King the fact that the proposed alternative order prepared by plaintiff and signed by Judge Jones on June 21, 1991 (Exhibit E-6) provided for an award of attorney's fees, (2) that said Order is not a "Judgment,", (3)

there is no basis for attorney's fees, and (4) even if attorney's fees are awarded, those fees should not include fees for matters in which plaintiff did not prevail.

On August 15, 1991, plaintiff filed a memorandum in opposition to Defendants' Motion to Stay Execution (Exhibit F-3). Plaintiff disputed every argument made by Mr. King -- except the assertion that plaintiff should only be entitled to an award of attorney's fees for matters upon which plaintiff prevailed. Plaintiff therefore attached a new affidavit of counsel re attorney's fees which subtracted approximately $1800 in attorney's fees (Exhibit F-4).

Judge Jones Refused to Modify Prior Orders, Or To Entertain Additional Motions, But Mr. King Demanded That Judge Jones Recuse Himself. The parties appeared before Judge Jones on August 23, 1991, and were told that Judge Jones would not alter any prior orders and that the parties would have to either settle the case or take it up on appeal. (See minute entry for August 23, 1991)

On August 23, 1991, Mr. King hand-delivered a letter to Judge Jones (Exhibit G-1) accusing him of being part of the problem, making additional allegations of wrongdoing against plaintiff's counsel, and asking Judge Jones to enter findings of fact or recuse himself.

Mr. King Obtained a Hearing Date and Filed a "Statement of Pending Issues" Which Essentially Constituted a Fourth Request to Set Aside the Court's Prior Rulings.

The plaintiff received a notice from Mr. King that a hearing was scheduled for September 19, 1991, together with a "Statement of Pending Issues." (Exhibit H-1) Plaintiff filed an opposing memorandum (Exhibit H-2) which argued that said Statement of Pending Issues sought to raise matters (for the fourth time) previously determined by the court and with respect to which there were no pending motions. Plaintiff requested an award of additional attorney's fees.

Judge Jones Heard Argument on Mr. King's Request to Revisit All Issues, and On Plaintiff's Request for Additional Attorney's Fees, On September 27, 1991.

The September 19, 1991 hearing was continued to September 27, 1991. Judge Jones heard argument as to all of Mr. King's claims of wrongdoing by plaintiff and plaintiff's counsel, and on plaintiff's request for additional attorney's fees. In this regard, plaintiff indicated that it would agree to a reduction of $1800 in attorney's fees for matters upon which plaintiff had not prevailed, but that additional substantial attorney's fees had been incurred in opposing Mr. King's various motions which should be awarded. Judge Jones indicated that he would take the matter under advisement and enter findings of fact. (See minute entry for September 27, 1991).

Defendant wrote a letter to Judge Jones on or about November 21, 1991 (Exhibit I-1). Plaintiff wrote a responsive letter to Judge Jones on or about November 27, 1991. (Exhibit I-2)

Judge Jones Entered a Minute Entry Affirming All Prior Orders, Denying All Motions to Reconsider and Directing Plaintiff to Prepare Findings of Fact.

On June 30, 1992, Judge Jones entered the following minute entry:

JONES/SC COURT RULES THAT:

1 SUMMARY JUDGMENT IS PROPER, THEREFORE WILL NOT BE SET ASIDE.

2 DEFT ANSWERS TO INTERROGATORIES & REQUEST FOR ADMISSIONS WAS LATE & PLTF REFUSSAL TO ACCEPT THEM IS PROPER.

3 DEFT CLAIM TO RIGHT TO TAKE DEPOSITION REGARDING PLTF ATTORNEY FEES IS ERRONEOUS. PLTF ATTORNEY TESTIMONY IS SUFFICIENT.

4 PRIOR RULINGS OF THE COURT WILL NOT BE ALTERED.

5 REQUEST BY DEFT FOR RECONSIDERATION IS INAPPROPRIATE

PLTF COUNSEL TO SUBMIT FINDINGS & ORDER FOR SIGNATURE
PLTF & DEFT COUNSEL NOTIFIED BY PHONE OF RULINGS

When Judge Jones ruled in this fashion, Mr King had made every claim of wrongdoing which he has continued to assert thereafter and through the present time -- all of which were specifically and emphatically rejected by Judge Jones.

Plaintiff Prepared a Proposed Order Pursuant to Judge Jones' Minute Entry, Which Provided For an Additional Award of Attorney's Fees.

Plaintiff prepared and served on defendants a proposed Findings of Fact and Conclusions of Law and Order (Exhibit J-1). Defendants filed an Objection to this proposed Order (Exhibit J-2) which amounted to a fifth motion to set aside. Plaintiff replied to the same (Exhibit J-3).

Judge Fuchs Heard Oral Argument on November 5, 1992, and Ruled That He Would Not Revisit the Prior Orders of Judges Grant and Jones, But Would Sign the Proposed Order Unless the Parties Could Stipulate to Modifications Thereto.

On November 5, 1992, Judge Fuchs heard oral argument from the parties (in essence a fifth "motion to set aside judgment" argument from Mr. King). Judge Fuchs indicated that he would sign the proposed order unless the parties could stipulate to a modified order within ten days thereof. (See minute entry for November 5, 1992).

The order was signed on December 16, 1992 -- which granted the plaintiff an additional award of $1,601.50 in attorney's fees (after setting off $1811 in fees) for attorney's fees incurred through July 20, 1992.

Plaintiff Attempted to Execute Upon This Judgment, But Defendants Thwarted Plaintiff's Attempts For Three Years.

On or about December 10, 1993, plaintiff filed a First Amended Notice of Judgment (Exhibit K-1) and sought to execute thereon. But, defendants filed an Ex Parte Motion to Stay Execution (Exhibit K-2) which again in essence sought reconsideration (for the sixth time) of all prior orders and accused plaintiff's attorney of various misconduct. Plaintiff opposed the motion. Judge Fuchs denied the motion after hearing argument on January 13, 1994, stating that "IF DEFT WANTS TO APPEAL CASE HE MAY POST BOND TWICE THE AMOUNT OF THE JUDGMENT." (See minute entry for January 13, 1994)

Rather than file an appeal, Mr. King filed a Petition for Writ of Mandamus with the Third District Court (essentially a seventh motion to set aside). The parties tried unsuccessfully to negotiate a settlement. Plaintiff filed a Second Amended Notice of Judgment in the Spring of 1995 (Exhibit K-3) which recomputed accrued interest on prior awards of principal, interest and attorney's fees herein up through the date of the notice.

The Defendant filed a motion for stay of execution in this court (essentially an eighth motion to set aside). Plaintiff filed a motion for an award of additional attorney's fees (Exhibit K-4). Judge Young denied defendants' petition for writ of mandamus. Judge Fuchs entered the instant order indicating that he would not revisit the granting of summary judgment herein, but would review the amount of interest and attorney's fees awarded herein (Exhibit K-5).

Plaintiff is Entitled to an Affirmation of All Prior Awards of Interest and Attorney's Fees, and to an Additional Award of Attorney's Fees as Requested in Plaintiff's Pending Motion For Fees. Plaintiff's position is very simple. Plaintiff was entitled to the Summary Judgment

entered in February of 1990, which provided for interest on principal at 18%, and interest on costs and fees at 12%, and which awarded attorney's fees and provided for the subsequent award of attorney's fees in collecting the same. Plaintiff has been required to successfully oppose at least eight separate motions attempting to set aside the summary judgment. The Order signed by Judge Fuchs on December 26, 1992 awarded plaintiff additional attorney's fees incurred up through July 20, 1992. This Court should affirm these prior awards, award additioanl attorney's fees and allow interest thereon as set forth below.

The Court has already awarded a judgment for the following:

On February 15, 1991:

1. 947.44 in principal;

2. Interest on said principal amount at 18% per annum from April 4, 1989 until February 26, 1991 in the amount of $323.06 plus interest on said principal amount at 18% per annum thereafter until paid in full;

3. Costs of $44.25 and attorney's fees of $2783.15; plus any additional attorney's fees incurred in collecting this judgment upon motion supported by counsel's affidavit;

4. With interest on the costs and attorney's fees awarded at 12% per annum from the date of judgment until paid in full.

And a separate judgment against Russell Sorensen for $65.86 plus interest thereon at 18% from March 23, 1989 until paid in full.

On June 21, 1991,

This Judgment was increased by the award of an additional $3875.00 in attorney's fees in connection with the Court's denial of defendants' motions to set aside summary judgment.

On December 16, 1992,

This judgment was increased again by the award of an additional $1601.50 in attorney's fees in connection with the Court's entry of it s Findings of Fact and

Conclusions of Law and Order.

WHICH JUDGMENTS SAMUEL KING WAS ALSO ORDERED TO PAY, AS SURETY, in the orders dated July 21, 1991 and December 16, 1992 (See Exhibit K-3).

Plaintiff's current motion for attorney's fees asks for an award of additional fees incurred from July 20, 1992 through July 5, 1995 in the amount of $5,325.00 (see Declaration of Brian Steffensen in Exhibt K-4).

Plaintiff should also be awarded fees incurred from July 5, 1995 through the hearing on this matter which will amount to at least 12 hours in attending hearings, reviewing documents, preparing this memorandum and arguing this motion on January 2, 1996, for an additional $1800.00, which will be supported by an affidavit of counsel to be submitted on January 2.

Therefore total interest and attorney's fees are as follows:

$ 947.44 (principal)
+ 1320.72 (interest on principal at 18%)
+ 2827.40 (44.25 + 2783.15) (original costs and fees)
+ 1655.87 (interest at 12% on cost and fees from 2/15/91)
+ 3875.00 (additional fees awarded on 7/21/91)
+ 2067.94 (interest at 12% on additional fees awarded from 7/21/91)
+ 1601.50 (additional fees awarded on 12/16/92)
+ 585.02 (interest on additional fees awarded from 12/16/92)
+ 68.86 (principal amount of judgment against Russell Sorenson)
+ 80.31 (interest at 18% on judgment against Russell Sorenson)
+ 5325.00 (additional fees asked for from 7/20/92 to 7/5/95)
+ 1800.00 (additional fees asked for from 7/5/95 to 1/2/96)

(Interest on all awards has been recomputed to determine the total amount due hereunder as of January 2, 1996.)

Totalling:$22155.06

DATED the 18th day of December, 1995.

Brian W. Steffensen
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of DECEMBER, 1995, I caused a true and correct copy of the foregoing instrument to be hand-delivered to the following individuals:

Samuel King
2120 South 1300 East, Suite 301
Salt Lake City, Utah 84106
FAX 486-3753

Nik Snarr